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No. 93-1841

In The Supreme Court Of The United States

October Term, 1994

ADARAND CONSTRUCTORS, INC.,
Petitioner,

v.

FREDERICO PENA,
Secretary of Transportation, et al.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR THE EQUALITY IN ENTERPRISE OPPORTUNITIES ASSOCIATION, INC. AS AMICUS CURIAE SUPPORTING RESPONDENT

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INTEREST OF THE EQUALITY IN ENTERPRISE OPPORTUNITIES ASSOCIATION, INC.

This case concerns the constitutionality of, and the legal standards to be applied to, legislation passed by the United States of America designed to benefit a class or classes of insular minorities. The Equality in

Enterprise Opportunities Association, Inc. was formed for the purpose of advocating on behalf of minorities participating or desiring to participate in federal acquisition minority benefit programs. A raised level of scrutiny would significantly impact the federal subcontracting opportunities of the minorities represented by the Equality in Enterprise Opportunities Association, Inc.

STATEMENT

In 1989, the United States Department of Transportation awarded a federal highway construction project to Mountain Gravel & Construction Company ("Mountain Gravel"). *Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537, 1541 (10th Cir. 1994), *cert. granted* 63 U.S.L.W. 3255 (U.S. Sept. 26, 1994) (No. 93-1841). The project included a rail construction subcontracting opportunity. *Adarand Constructors*, 16 F.3d at 1542. Mountain Gravel solicited bids from qualified subcontractors including Adarand Constructors, Inc. ("Adarand "), a non-minority owned contractor, and Gonzales Construction Company ("Gonzales"), a Hispanic American owned firm. *Id.* at 1539, 1541, 1542 n.8. Although Adarand submitted the lowest bid, Mountain Gravel awarded the subcontract to Gonzales. *Id.* at 1542.

Under the Department of Transportation contract, Mountain Gravel received $10,000 as a bonus for subcontracting with a company owned by a socially and

economically disadvantaged individual. *Id.* at 1542.[1] Gonzales, but not Adarand, was certified under section 8(a) of the Small Business Act as socially and economically disadvantaged. *Id.* at 1539, 1541 & nn.5 & 6, 1542 n.8. Under the Small Business Act, anyone can apply to be certified as socially and economically disadvantaged. 15 U.S.C. § 637(a). The Act provides a rebuttable presumption that "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities" are in fact socially and economically disadvantaged. 15 U.S.C. § 637(d)(3)(C).

Adarand filed suit in the United States District Court for the District of Colorado claiming, *inter alia*, violation of its right to equal protection as applied to the federal government under the Fifth Amendment. *Adarand Constructors*, 16 F.3d at 1539. Adarand claimed that it had been racially discriminated against due to its non-minority ownership and that this racial discrimination violated the United States Constitution. *Id.* at 1539-40. Adarand lost on summary judgment, and appealed to the United States Court of Appeals for the Tenth Circuit. *Id.*

The Tenth Circuit examined the leading cases on affirmative action business programs, notably *Fullilove*

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[1] *But see* Adarand Constructors, Inc. v. Pena, 62 U.S.L.W. 3809 (June 7, 1994) (Petition for Writ of *Certiorari*, hereinafter "Petition") (alleging Mountain Gravel became entitled to a bonus payment of $30,000).

v. Klutznick, 448 U.S. 448 (1980), *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989), and *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547 (1990), and determined that courts must strictly scrutinize state governments when they enact affirmative action business programs. *Adarand Constructors*, 16 F.3d at 1545. The court explained, however, that the federal government need only satisfy a lesser standard of scrutiny, intermediate scrutiny. *Id.* at 1545.[2] The Tenth Circuit upheld the summary judgment because the Act's 8(a) program withstood intermediate scrutiny. *Id.* at 1547.

SUMMARY OF ARGUMENT

The essence of this action deals with the rebuttable presumption that certain minorities are socially and economically disadvantaged. All other aspects of the Small Business Act program are subject only to rational basis review.

The Fourteenth Amendment, as interpreted by the Court, grants Congress the positive power to further the right to societal participation. This right, however, is

[2] The strict scrutiny standard requires that courts strike down legislation if not "necessary" to achieve a "compelling" or "overriding" government purpose. *City of Richmond v. J.A. Croson Company.*, 488 U.S. 469 (1989). Under the intermediate scrutiny standard, a court must uphold legislation so long as it is "substantially related" to an "important" government purpose. *Id.*

limited to "discrete and insular minorities." Since Congress can legislatively recognize that certain racial classes have been historically disadvantaged, the Small Business Act's rebuttable presumption remains constitutional.

The Small Business Act, as applied to Petitioner, contains none of the hallmarks which make a racial classification suspicious. Since nothing indicates that Congress acted out of racial animus, strict scrutiny is inappropriate.

Equal protection analysis requires, at a minimum, that the offending law disadvantage or unduly burden the Petitioner in some way. Petitioner can establish no undue burden. Petitioner has never sought nor been refused certification as a socially and economically disadvantaged firm. Thus, Petitioner has never been disadvantaged by the Small Business Act's rebuttable presumption. Absent any legally cognizable detriment, Petitioner has not been denied the equal protection of the law.

The Court's holding in *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989), is inapplicable to this action. *City of Richmond* dealt with a local government set-aside program factually distinct from the Small Business Act's rebuttable presumption. Factual predicates noted by the Court in *City of Richmond* remain absent in this action. Since Petitioner's challenge to the Small Business Act is both factually and

legally distinct, application of the Court's holding is inappropriate.

The Court established, in *Bolling v. Sharpe*, 347 U.S. 497 (1954), a reduced standard of review for federal racial classifications. This reduced standard was reaffirmed in *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547 (1990). Since none of the conditions for abandoning the doctrine of *stare decisis* exist, the reduced scrutiny review remains the appropriate standard for federal legislation

ARGUMENT

The heart of Petitioner's challenge to the Small Business Act is to the legislation creating a rebuttable presumption ("Rebuttable Presumption") in federal contracting that certain classes of minorities are socially and economically disadvantaged. Petition at 6 & n.5; 15 U.S.C. 637(d)(3)(C). If considered socially and economically disadvantaged, an individual's company qualifies for special treatment on federal contract awards, including the subcontract award leading to this challenge. *Adarand Constructors*, 16 F.3d at 1547. Absent the Rebuttable Presumption, no issue exists whether the small business preferences in the Small Business Act violate the Equal Protection Clause. As an economic classification, the preferences would receive rational basis scrutiny. *See Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1

(1973). Such scrutiny must necessarily have been satisfied when the Tenth Circuit denied Petitioner's challenge through application of intermediate scrutiny. *Adarand Constructors*, 16 F.3d at 1547.

Thus, the substance of Petitioner's challenge remains the Rebuttable Presumption, which presumes that certain minorities are socially and economically disadvantaged.

I. CONGRESS MAY ENFORCE THE FOURTEENTH AMENDMENT'S RIGHT TO SOCIETAL PARTICIPATION WITH POSITIVE LEGISLATION

The Civil War Amendments were enacted for the benefit of the freed slaves. *Slaughter-House Cases*, 16 Wall. 36, 21 L. Ed. 394, 407 (1873) (The "one pervading purpose" of the Civil War Amendments "without which none of them would have been even suggested" is "the freedom of the slave race, the security and firm establishment of that freedom."). The Thirteenth Amendment freed resident African Americans from the bonds of servitude under which they had lived. However, because the Thirteenth Amendment failed to protect the civil liberties of the newly freed slaves, the Fourteenth Amendment was enacted. *Id.*

To preclude the states from abrogating the rights of the freed slaves, the Fourteenth Amendment gives Congress the power to enforce those rights: "The Congress shall have power to enforce, by appropriate

legislation, the provisions of this article." U.S. CONST. XIV AMEND. § 5. Section 5 allows Congress to "redress the effects of society-wide discrimination." *City of Richmond*, 488 U.S. 469, 490 (1989) (O'CONNOR, J., plurality opinion) ("Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment."); *see also Fullilove v. Klutznik*, 448 U.S. 448, 476 (1980) (Burger, J., plurality opinion) (Congress can require States and local governments to administer the set-aside program under § 5 of the Fourteenth Amendment.).

The affirmative right to societal participation is included in the liberties guaranteed by the Fourteenth Amendment which may be enforced by Congress. *Slaughter-House Cases*, 21 L. Ed. at 407; *see also City of Richmond v. J.A. Croson Company*, 488 U.S. 469, 511 (1989) (STEVENS, J., concurring) ("A central purpose of the Fourteenth Amendment is to further the national goal of equal opportunity for all our citizens."). The Fourteenth Amendment contains "a necessary implication of a positive immunity or right, most valuable to the colored race." *Strauder v. West Virginia*, 100 U.S. 303, 307-308 (1880). This positive right includes the right to be free from "legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy." *Id.* The right to societal participation is also evidenced by the subsequent enactment of the Fifteenth Amendment which secured for the newly freed slaves the

right to participate in the democratic process. *See Slaughter-House Cases*, 16 Wall. 36, 21 L. Ed. 394, 407 (1873). Accordingly, since the Thirteenth Amendment guaranteed that no man could be the property of another and the Fifteenth Amendment secured participation in the democratic process, the Fourteenth Amendment necessarily protects those rights incident to societal participation.[3]

The propriety of the right to societal participation has seldom been doubted, and only once by the Court. *See Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by Brown v. Board of Education of Topeka, Shawnee County, Kansas*, 347 U.S. 483 (1954) (separation of socially incompatible races is constitutional). When the Court overruled *Plessy*'s "separate but equal" doctrine in *Brown*, it reaffirmed the Fourteenth Amendment right to societal participation. In *Plessy*, the Court determined that the Fourteenth Amendment did not assure African Americans the right to participate in American society:

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[3] From hindsight, the need for the affirmative guarantee of the Fourteenth Amendment can be explained by the problem of the majority faction. James Madison wrote: "When a majority is included in a faction, the form of popular government. . .enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens." THE FEDERALIST No. 10, 20 (James Madison) (Washington Square Press ed. 1964). Since minorities, by definition, are not within the majority class, the affirmative guarantee to societal participation remains necessary to guard against factionist tendencies.

> The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to each other.

163 U.S. at 544. "If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane." *Id.* at 552. In overruling *Plessy*, the *Brown* Court necessarily returned to its earlier view -- that the Constitution includes the affirmative right to societal participation.

Further, the Court in *Brown* specifically addressed the right to societal participation. The *Brown* Court noted that the children on whose behalf the suits were brought were given equal treatment under the law,[4] but held that equality of treatment was insufficient: "Our decision, therefore, cannot turn on merely a comparison of these tangible factors. . . . We must look instead to the effect of segregation itself upon public education." *Brown*, 347 U.S. at 492. The Court found that mere equality of treatment socially stigmatized the

[4] "Here. . .there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to [all] 'tangible factors.'" *Brown*, 347 U.S. at 492 (omitting footnotes).

black children: "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Id.* at 494.

The affirmative right to societal participation, however, does not extend to the majority race. The right turns on recognition of society's treatment of insular minorities as inferior. In *City of Richmond*, Justice O'Connor stated, "Classifications based on race carry a danger of stigmatic harm." 488 U.S. at 493. While Justice O'Connor clearly intended her statement to cover all races, in fact, the majority races have no need to fear stigmatism. As stated by the dissenting Justice Harlan in *Plessy*, "Sixty millions of whites are in no danger from the presence here of eight millions of blacks." 163 U.S. at 560 (Harlan, J., dissenting). Indeed, in his classic line that "our constitution is color blind," Justice Harlan cached the Constitution's blindness in terms of legislation which would maintain the supremacy of the white race over the inferior black race:

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty. But in view of the constitution, in

> the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens.

Plessy, 163 U.S. at 559 (Harlan, J., dissenting).[5]

While today Justice Harlan's statements may raise an eyebrow, it is nevertheless true that throughout the development of equal protection law the concern has been upon protecting racial and ethnic minorities historically treated as "inferior." *See Brown*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (invalidating "separate but equal" doctrine in the District of Columbia); *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) (describing the purpose for strict scrutiny); *Metro Broadcasting, Inc. v. Federal*

[5] Justice Harlan's famous line, in modern times, has often been quoted out of context. See *City of Richmond*, 488 U.S. 469, 521 (SCALIA, J., concurring):

> At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb. . .can justify an exception to the principle embodied in the Fourteenth Amendment that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens."

Id. (quoting *Plessy v. Ferguson*, 163 U.S. at 537 (Harlan, J., dissenting)).

Communications Commission, 497 U.S. 547 (1990); *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (upholding a set-aside to benefit disadvantaged minorities); *see also Muller v. Oregon*, 208 U.S. 412 (1908) (in the due process context, recognizing that the protection of women, as a weaker sex, requires a different rule of law).[6] When the Court first announced the "suspect" classification doctrine, in *Korematsu v. United States*, 323 U.S. 215 (1945), the Court held that the purpose for strictly scrutinizing suspect legislation, such as the internment of Japanese-American citizens, is to determine whether it was enacted in collusion with "racial antagonism." *Id.* at 216.

In the instant action, there is no evidence in the record suggesting that the owner of Petitioner has ever been subject to racial antagonism or has historically been treated as inferior. Conversely, Congress made extensive findings identifying the need for increased participation in federal contracting for minorities such as Gonzales. *See, generally,* Brief For The Respondents In Opposition at 15 n.5 (identifying three separate rounds of congressional hearings considering minority

[6] The early American citizens had no need for a Constitutional right to equal protection. The white citizens who founded our Nation could express their views on unfriendly legislation with full effect in the state houses. In fact, Alexander Hamilton even argued that the citizens needed no Bill of Rights. *See* THE FEDERALIST No. 84 (Alexander Hamilton) (Washington Square Press ed. 1964). According to Mr. Hamilton, the Constitution itself is a Bill of Rights. *Id.* at 150-153.

participation in federal contracting).[7] Certainly, Gonzales satisfied the requirements for being considered socially and economically disadvantaged. *Adarand Constructors*, 16 F.3d at 1542; Petition at 5. Had Petitioner considered Gonzales otherwise, the Small Business Act allows him to rebut the presumption of Gonzales' disadvantage. Petitioner failed to make any attempt at disproving the presumption, but rests upon the theory that the Fourteenth Amendment, which grants "discrete and insular" minorities an affirmative right to societal participation, cannot countenance a rebuttable presumption. Petitioner, in effect, requests the Court to rule that the Fourteenth Amendment precludes Congress from recognizing that certain racial classes have been historically disadvantaged in our society, both socially and economically.[8] Since the Fourteenth Amendment as

[7] In fact, when President Richard Nixon first instituted the minority program, by Executive Order No. 11,625, 36 Fed. Reg. 19,967 (1971), he stated: "The opportunity for full participation in our free enterprise system by socially and economically disadvantaged persons is essential if we are to obtain social and economic justice and improve the functioning of our national economy." *Id.* The Executive Order defined the "minority business enterprise" subject to the affirmative order to include, conclusively, "Negroes, Puerto Ricans, Spanish-speaking Americans, American Indians, Eskimos, and Aleuts." *Id.*; *contra* Petitioner's Brief at 30 (Congress did not indicate diversity as the reason for racial classifications).

[8] Petitioner, however, does not challenge the Court's ability to recognize societal disadvantage. Petitioner asks the court to apply *City of Richmond* universally, but even in *City of Richmond* it was

interpreted by this Court grants Congress that power, Petitioner's challenge must fail.

II. PETITIONER PRESENTS NO "SUSPICIOUS" LEGISLATION JUSTIFYING STRICT SCRUTINY

Petitioner's request that the Court strictly scrutinize the Rebuttable Presumption seeks a departure from judicial deference unsupported in the Court's decisions. Strictly scrutinizing legislative enactment is appropriate only when the circumstances surrounding the enactment create a fear of improper legislative motive. *Korematsu v. United States*, 323 U.S. 215 (1945); *see also United States v. Carolene Products Company*, 304 U.S. 144, 152 n.4 (1938). Petitioner presents no facts which would suggest Congress had any improper motive in enacting the Rebuttable Presumption, nor any reasons to compel such suspicion.

The fear of improper motive in a racial classification exists where there is a likelihood that a legislature acted out of prejudice or racial animus. The first time the Court suggested lessened judicial deference for legislative racial classifications, in *Carolene*

recognized that certain minorities are socially and economically disadvantaged. Justice Scalia, in his concurrence, stated "It is plainly true that in our society blacks have suffered discrimination immeasurably greater than any directed at other racial groups." 488 U.S. 469, 527-28 (SCALIA, J., concurring).

Products, the Court noted the purpose for a "more searching judicial inquiry" would be to determine if the legislation was motivated out of prejudice against "discrete and insular minorities." 304 U.S. at 152 n.4. Likewise, the first time the Court applied strict scrutiny, in *Korematsu*, the Court was examining the conviction of Mr. Korematsu, a Japanese American, for violating the west coast exclusion order, a blatantly prejudice laden fact scenario. *Korematsu*, 323 U.S. 215. The *Korematsu* Court, even while upholding the conviction, stated that "all legal restrictions" upon the "civil rights of a single racial group are immediately suspect" requiring "the most rigid scrutiny" to determine whether the offending law is motivated by "racial antagonism." *Id.* at 216.

Petitioner is not owned by a "discrete and insular minority," but instead by a member of the majority race. Petitioner suffers no legal restriction, such as a criminal conviction, but instead claims a loss of a contractual opportunity.[9] Petitioner can claim no fear that the Rebuttable Presumption was enacted out of racial animus; Congress is overwhelmingly white as is Petitioner's owner. *See* THE FEDERALIST No. 10, 19 (James Madison) (Washington Square Press ed. 1964) ("If a faction consists of less than a majority, relief is supplied by the republican principal, which enables the majority to defeat its sinister views, by regular vote.").

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[9] See, *supra*, page 18 & note 10 (the demise of *Lochner v. New York*, 198 U.S. 45 (1905)).

Thus, strict scrutiny remains inapplicable to Petitioner's claim.

III. PETITIONER CLAIMS NO BURDEN OR DISADVANTAGE COGNIZABLE UNDER THE EQUAL PROTECTION CLAUSE

According to the Small Business Act, anyone, including Petitioner, may apply and potentially qualify for treatment as a socially and economically disadvantaged firm. 15 U.S.C. 637(a). However, Petitioner never applied. For an equal protection claim to be cognizable, Petitioner must show that the Rebuttable Presumption unduly burdened it or placed it at a disadvantage. *Nebbia v. New York*, 291 U.S. 502, 521 (1934) (failure to show any disadvantage created by law is fatal); *see also Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791, 2816-2822 (1992) (in the substantive due process context, the question is whether the law unduly burdens the individual).

The Equal Protection Clause applies to federal legislation through the Due Process Clause of the Fourteenth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954). The Court recently determined that review for substantive due process focuses on whether the offending law unduly burdens an individual in a fundamental right. *Casey*, 112 S. Ct. at 2816-2822 (1992). This undue burden standard has also been utilized, in part, in an equal protection challenge to

federal racial classification. *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547, 596 (1990) (A congressional race classification that passes intermediate scrutiny "is consistent with equal protection principles so long as it does not impose *undue* burdens on non-minorities." (emphasis in original)).

In the present action, Petitioner establishes no denial of a fundamental right or disadvantage. No fundamental right is indicated in the record. Further, Petitioner enjoys no liberty interest in federal subcontracting opportunities. The substantive analysis of legislation infringing on contractual liberty[10] has long been interred. *See Nebbia v. New York*, 291 U.S. 502 (1934).[11] Additionally, Petitioner has suffered no disadvantage. In *Nebbia*, the appellant challenged, on equal protection grounds, a law which fixed the price of milk as sold by farmers and dealers. *Id.* (the challenger also challenged the law on substantive due process grounds). The Court noted that, though the law classified the price of milk between dealers and farmers, the appellant remained free to purchase from either "had he so desired." *Id.* The appellant's failure to exercise

[10] *See* Lochner v. New York, 198 U.S. 45 (1905).

[11] Ironically, Petitioner asserts that *Metro Broadcasting* is inapplicable because of First Amendment issues present in that case. Petitioner's Brief at 28. However, Petitioner cannot bootstrap itself into strict scrutiny by suggesting the absence of a Fundamental Right weighs in favor of, rather than against, strict scrutiny.

his options proved fatal. "There is therefore no showing that the order placed him at a disadvantage, or in fact affected him adversely, and this alone is fatal to the claim of denial of equal protection." *Id.* Likewise, Petitioner, in failing even to attempt to be certified socially and economically disadvantaged, fatally foreclosed his claim of a denial of equal protection.

IV. THE HOLDING IN *CITY OF RICHMOND V. J.A. CROSON COMPANY*, 488 U.S. 469 (1989), IS LEGALLY AND FACTUALLY INAPPLICABLE

Petitioner is mistaken in its determination that the holding in *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989) applies to its challenge. Beyond the fact that *City of Richmond* dealt with a local affirmative action program, which deserves considerably less deference than a federal program,[12] the issues

[12] Upon concluding, in *City of Richmond*, that "a sound distinction between federal and state action based on race" was required by the Civil War Amendments, Justice Scalia stated:

> [I]t is one thing to permit racially based conduct by the Federal Government – whose legislative powers concerning matters of race were explicitly enhanced by the Fourteenth Amendment. . . – and quite another to permit it by the precise entities against whose conduct in matters of race that Amendment was specifically directed."

City of Richmond, 488 U.S. at 521-22 (SCALIA, J., concurring).

presented in Petitioner's challenge are significantly different.

In *City of Richmond*, the appellant challenged the city's 30% minority set-aside quota as a denial of equal protection. *Id.* at 478. After Justice O'Connor explained the significant Constitutional difference between states (and local governments) and the federal government in the power to enact affirmative action programs,[13] she applied strict scrutiny. *Id.* at 498-508. In finding that the quota failed strict scrutiny, Justice O'Connor noted that "the city does not even know how many MBE's in the relevant market are qualified to undertake prime or subcontracting work" and that the quota seemed "to rest upon the unsupported assumption that white prime contractors simply will not hire minority firms." *Id.* at 502.

In the present action, the Court faces a federal, not a state or local government, program. Congress knows with sufficient particularity how many insular minorities are socially and economically disadvantaged -

[13] Congress may "redress the effects of society-wide discrimination," but States may not. *City of Richmond*, 488 U.S. at 490 (O'CONNOR, J., plurality opinion). Were a State empowered to create a racial classification by "the mere recitation of a benign or compensatory purpose," the State would have "the full power of Congress under §5 of the Fourteenth Amendment" *Id.* But this "would be contrary to the intentions of the Framers of the Fourteenth Amendment." *Id.*

- most of them.[14] Congress merely embodies its knowledge and findings in a rebuttable presumption. Thus, from a legal posture and a factual lack, the holding in *City of Richmond* remains inapplicable to Petitioner's challenge.

V. THE COURT SHOULD NOT OVERRULE PRECEDENT ESTABLISHING REDUCED SCRUTINY

Consonant with the determination that section 5 of the Fourteenth Amendment gives Congress the affirmative power to legislate on behalf of those historically subject to racial antagonism are the Court's determinations in *Bolling v. Sharpe*, 347 U.S. 497 (1954), and *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547 (1990), that racial classifications by the federal government receive a standard of review less stringent than that applied to the States. According to the holding in *Planned Parenthood of Souteastern Pennsylvania v. Casey*, 112 S. Ct. 2791, 2808-2816 (1992), concerns for judicial integrity and respect for a National rule of law require adherence to these prior, workable decisions pursuant to the doctrine of *stare decisis*. *Id.*

[14] Certainly, Congress can take notice of matters of general knowledge to the same, or greater, extent as the judiciary. *See* Muller v. Oregon, 207 U.S. 412, 421 (1908) ("We take judicial cognizance of all matters of general knowledge.").

The first time the Court applied the equal protection component of the Fourteenth Amendment to the federal government, in *Bolling*, the Court applied a lesser standard of review than strict scrutiny. In holding that segregated schooling in the District of Columbia is discrimination severe enough to violate the Fifth Amendment's Due Process Clause, the Court stated: "Segregation in public education is not reasonably related to any proper governmental objective. . . ." *Bolling*, 347 U.S. at 500. Since this standard of review for racial classifications by the federal government has never been overruled, the Court should adhere to its determination.

Further, the Court, for all intents and purposes, reaffirmed the *Bolling* standard of review in *Metro Broadcasting*. Four years ago, in *Metro Broadcasting*, a five Justice majority applied intermediate scrutiny to a federal racial classification in federal communications licensing. In upholding the federal classification, Justice Brennan stated: "We hold that benign race conscious measures mandated by Congress. . .are constitutionally permissible to the extent that they serve important governmental objectives. . .and are substantially related to achievement of those purposes." *Metro Broadcasting*, 497 U.S. at 564-65.[15]

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[15] Here, Congress and the President determined the need for societal equality in contracting opportunities. *See*, *supra*, page 13, 14 & note 7. Thus, the concern expressed by the dissent in *Metro Broadcasting* over the majorities' "benign race conscious" language

In its Petition for Writ of *Certiorari*, Petitioner suggests that the use in *Metro Broadcasting* of intermediate scrutiny did not command a majority of the Court. Petition at 12. This is simply incorrect. Justices White, Marshall, Blackmun, and Stevens joined the opinion of Justice Brennan. *Metro Broadcasting*, 497 U.S. at 552. Petitioner suggests that Justice Stevens' concurring opinion set forth a different standard of review than that used by Justice Brennan. Petition at 12 & n.11. Petitioner fails to note that at the end of Justice Steven's concurrence, he stated "I join both the *opinion* and the judgment of the Court." *Metro Broadcasting*, 497 U.S. at 601-602 (STEVENS, J., concurring) (emphasis added).

Due to the proximity in time between the decision in *Metro Broadcasting* and the instant action, the fears embodied by the doctrine of *stare decisis* are magnified. In her discussion of the doctrine, in *Casey*, Justice O'Connor examined the overruling of *Lochner v. New York*, 198 U.S. 45 (1905), by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), and the overruling of *Plessy v. Ferguson*, 163 U.S. 537 (1896) by *Brown v. Board of Education of Topeka, Shawnee County, Kansas*, 347 U.S. 483 (1954). *Casey*, 112 S. Ct. at 2812-813 (O'CONNOR, J., for the Court). Justice O'Connor found, among other factors, that in the

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remains inapplicable in the instant action. *See* Metro Broadcasting, 497 U.S. at 602 (O'CONNOR, J., dissenting).

distance in time between the overruled cases to their respective replacements societal conditions had changed significantly. *Casey*, 112 S. Ct. at 2813. In the instant action, Petitioner puts forward no arguments even hinting at changed conditions. Indeed, how much can the texture of federal acquisition and licensing law change in four years. Because the Court should not examine "each issue afresh in every case that raised it,"[16] changing the established level of scrutiny after only four year remains inappropriate. Accordingly, Petitioner's challenge to the Rebuttable Presumption must fail.

CONCLUSION

The judgment of the United States Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted.

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[16] Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791, 2808 (1992) (O'CONNOR, J.) (citing B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921)).